

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

HACIENDA LA PUENTE UNIFIED
SCHOOL DISTRICT.

OAH CASE NO. 2014120050

ORDER DENYING DISTRICT'S
MOTION TO SHIFT EXPENSES

On April 1, 2015, Hacienda La Puente Unified School District filed a Motion to Shift Costs, supported by the Declaration of Ricardo R. Silva and Exhibits. On April 2, 2015, Student filed Opposition to District's Motion to Shift Expenses and, on April 3, 2015, District filed its Reply to Student's Opposition. Administrative Law Judge Clifford H. Woosley reserved ruling upon District's motion until after issuance of the Decision herein. The Decision issued on July 3, 2015.

District asserts that Student's March 3, 2015 request that District fund independent educational evaluations, shortly before the scheduled hearing, commenced a series of bad faith actions and tactics that were solely intended to harass the District and/or cause unnecessary expense and delay, which prejudiced District. Student contends that his request for District to fund independent evaluations were never intended to delay the hearing and, further, Student's subsequent withdrawal of his request was merely because Parents had decided to fund their own IEE's. As discussed below, District has failed to demonstrate it is entitled to a shift of expenses.

Judge Woosley convened a prehearing conference on March 6, 2015, for the hearing scheduled to begin on March 16, 2015. Attorneys Surisa Rivers and Sarah Gross appeared on behalf of Student. Attorneys Ricardo Silva and Karin M. Anderson appeared on behalf of District. The PHC was recorded. Judge Woosley reviewed the issues and ruled on various motions. Mr. Silva then stated that the District would likely be filing a due process complaint in response to Student's March 3, 2015 request that District fund IEE's. Further, District would then seek to consolidate its newly filed complaint with Student's complaint herein. ALJ Woosley noted that a consolidation of the two cases would result in the issuance of a new scheduling order and that the hearing in this matter would be continued to the new hearing date in the consolidated cases.

Though District had yet to file its complaint and motion, discussion ensued regarding consolidation. District's contemplated due process complaint would be for the purpose of demonstrating that its evaluations or assessments were appropriate and, therefore, District would not be obligated to fund independent evaluations. Since Student's complaint

concerned District's determination that Student was not eligible for special education, the appropriateness of the District's assessments would be part of Judge Woosley's determination of whether District assessed Student in all areas of suspected disability. Therefore, a motion to consolidate would likely be granted and the March 16, 2015 hearing on the Student's complaint would be continued to the hearing scheduled in the consolidated matters.

Ms. Rivera expressed surprise at District's stated intent of moving to consolidate its due process complaint with Student's case. Ms. Rivera strongly argued against any such consolidation because she did not want the Student's case to be continued. Therefore, it is apparent that Student and his counsel did not intend to delay the hearing on his complaint when requesting that District fund IEE's.

Subsequently, District filed its complaint and motion to consolidate. The motion was granted and a new scheduling order issued for the consolidated cases, setting the PHC for March 23, 2015 and hearing for March 30, 2015. The March 16, 2015 hearing was vacated.

The parties submitted a joint stipulation to continue the hearing date of March 30, 2015, which was not available for either party. The parties sought a continuance to April 14 and May 4, 5, 6, and 7, 2015. On March 19, 2015, Student notified District that he withdrew his request that District fund independent evaluations and, further, affirmed the withdrawal in his prehearing conference statement.

On March 23, 2015, ALJ Woosley convened the PHC and heard argument regarding the parties' request for continuance. The parties sought to have District's witness Ms. Duggan testify on April 14, 2015, and then resume the hearing on May 5, 2015. Ms. Duggan was departing on maternity leave on March 27, 2015; she was due to give birth by the end of April. Therefore, her testimony needed to be taken as soon as possible; she agreed to personally appear for her testimony on April 14, 2015. ALJ Woosley granted the joint continuance request, setting the first day of hearing for April 14, 2015, and the remaining hearing days on May 5 through 7, 2015. A new PHC was set for April 6, 2015.

Subsequently, Ms. Dugan informed District that her doctor would not let her personally appear for her testimony. Therefore, when the hearing on the consolidated matters convened on April 14, 2015, ALJ Woosley allowed Ms. Dugan to testify telephonically. District argues that having Ms. Dugan testify telephonically prejudiced District because her personal appearance would have been more impactful and persuasive. However, as indicated in the July 3, 2015 Decision, District's ability to present its case was not compromised by Ms. Dugan's telephonic testimony.

On the second day of hearing on May 5, 2015, Ms. Rivera confirmed on the record that Student had withdrawn his request that District fund independent evaluations; Student would not again make the request. Relying on these representations, District withdrew its complaint. ALJ Woosley ordered the District's complaint dismissed and that the hearing proceed on Student's complaint.

The hearing proceeded to conclusion, the parties filed their final briefs, the record was closed, and the matter was submitted for decision on June 15, 2015. The Decision issued on July 3, 2015, in favor of District.

APPLICABLE LAW

In a special education due process matter, the Government Code and the California Code of Regulations authorize an Administrative Law Judge (ALJ) to issue sanctions that shift expenses caused by a party acting in bad faith, or using tactics that are frivolous or solely intended to cause unnecessary delay.¹ Government Code section 11455.30 provides:

(a) The presiding officer may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure.²

(b) The order, or denial of an order, is subject to judicial review in the same manner as a decision in the proceeding. The order is enforceable in the same manner as a money judgment or by the contempt sanction.³

This section is implemented by California Code of Regulations, title 1, section 1040, which provides:

(a) The ALJ may order a party, a party's representative or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

¹ In special education due process procedures, California Code of Regulations, title 5, section 3088 requires that the *California* Department of Education (DOE) first approve an ALJ's consideration of sanctions for contempt or for payment of expenses to the California Department of Special Education. However, the ALJ's authority to shift expenses per Government Code section 11455.30 is unabated.

² This section refers to "presiding hearing officers." The ALJ presiding over the hearing is the presiding officer. Government Code section 11405.80 makes clear that an ALJ who presides in an adjudicative proceeding is the "presiding officer," a point confirmed in *Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F. 3d 1026, 1029.

³ California Code of Regulations, title 5, section 3088, modifies this subsection for special education proceedings, stating that the failure to impose a sanction for expenses is not appealable.

(1) “Actions or tactics” include, but are not limited to, the making or opposing of Motions or the failure to comply with a lawful order of the ALJ.

(2) ‘Frivolous’ means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party.

(b) The ALJ shall not impose sanctions without providing notice and an opportunity to be heard.

(c) The ALJ shall determine the reasonable expenses based upon testimony under oath or a Declaration setting forth specific expenses incurred as a result of the bad faith conduct. An order for sanctions may be made on the record or in writing, setting forth the factual findings on which the sanctions are based.

This regulation incorporates the generally accepted grounds for sanctions under Code of Civil Procedure section 128.5. (See *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635-637.) California cases applying section 128.5 hold that a trial judge must state specific circumstances giving rise to the award of expenses and articulate with particularity the basis for finding that the sanctioned party’s conduct reflected tactics or actions that were performed in bad faith, were frivolous, designed to harass, or designed to cause unnecessary delay. (*Childs v. Painewebber Inc.* (1994) 29 Cal.App.4th 982, 996; *County of Imperial v. Farmer* (1998) 205 Cal.App.3d 479, 486.) The purpose of the statute is not only to compensate, but it is also a means of controlling burdensome and unnecessary legal tactics. (*On the Cow Hollow Properties* (1990) 222 Cal.App.3d 1577.) There must also be a showing of an improper purpose. An improper purpose may be inferred from the circumstances. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.)

DISCUSSION

District’s assertion that Student intended to delay his case, by requesting that District fund independent evaluations just a few days before hearing, is not supported by the evidence. The evidence indicates the contrary. At the March 6, 2015, PHC, Ms. Rivers was genuinely surprised that the request for funded independent evaluations might result in a continuance of the March 16, 2015 hearing. It was apparent that Student did not plan for the request to delay the scheduled hearing.

Further, though statutorily required to file a complaint to defend its assessments, District did not have to file a motion to consolidate. As discussed at the March 6, 2015 PHC, ALJ Woosley was going to decide if the District’s assessments were legally appropriate in determining if the District comprehensively evaluated the Student in all areas of suspected disability for initial eligibility consideration. Therefore, District would be addressing the appropriateness of its assessments in Student’s case; consolidation was not necessary. Thereafter, such determination would have been binding in District’s due process complaint pursuant to the principles of res judicata and/or collateral estoppel. It was District’s motion

to consolidate that delayed the hearing, not Student's request that District fund independent evaluations.

District points to Student's last minute withdrawal of his request for funded independent evaluations as evidence of Student's bad faith or frivolous conduct. Student's conduct caused District to bear the expense of filing a complaint, making a motion, and dealing with the consequences of a delayed hearing. However, the evidence establishes that Student and his counsel did not exhibit the requisite bad faith, or that the actions and tactics were totally without merit, intended for the sole purpose of harassing the opposing party, or designed to cause unnecessary delay. Student's strategic choices and last minute maneuvers may have been frustrating, or even ill-advised, but they do not demonstrate the intent necessary to support a shifting of costs.

Ms. Dugan's telephonic testify did not compromise District. As noted in the Decision herein, District's assessments were appropriate. Further, District prevailed on all issues. Therefore, District was not prejudiced by Student's actions or tactics.

ORDER

District's motion to shift expenses is denied.

DATE: July 3, 2015

/s/

CLIFFORD H. WOOSLEY
Administrative Law Judge
Office of Administrative Hearings